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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1084

ANTHONY MUCNOLA and PETER ANTHONY YUASTELLA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1963

No.

ANTHONY MUGNOLA and PETER ANTHONY YUASTELLA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Anthony Mugnola and Peter Anthony Yuastella, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 17, 1964.

Opinions Below

The District Court rendered no "opinion" relating to the within petitioners (see opinion relating to a co-defendant, Charles Gersh, printed at p. 350a of the "Joint Appendix for Defendants-Appellants" in the Court below, hereinafter cited as " a"). The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, pp. A-1 *et seq.*, is reported in 328 F. 2d 460.

Jurisdiction

The judgment of the Court of Appeals was entered on February 17, 1964 (Appendix, *infra*, p. A-10). A timely petition for rehearing was entertained by the Court of Appeals, and was considered and denied by it on the merits on March 16, 1964. By order of the Honorable Mr. Justice John M. Harlan, dated April 9, 1964, the time within which to file a petition for a writ of certiorari in this case was extended to and including May 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Were petitioners denied a trial by a fair and impartial jury in view of indicated intimidation of the jury by an unknown person or persons and refusal of both of the Courts below to afford the defense an adequate opportunity to explore this matter?

2. Were petitioners denied a fair trial by improper joinder of parties and offenses, and by improper resort to the conspiracy device of prosecution?

3. Were petitioners improperly convicted without proof of the corpus delicti (alleged counterfeit money).

4. Were petitioners denied a fair trial by the instruction to the jury that the principal prosecution witness was an accomplice as a matter of law?

Constitutional Provision and Statutes Involved

The case involves the Sixth Amendment of the Constitution of the United States ("impartial jury"), 18 U.S.C. §371 (the general conspiracy statute), 18 U.S.C. §472 (possession, etc. of counterfeit money), and 18 U.S.C. §2 (aiders and abettors as principals).

18 U.S.C. 472 reads as follows:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both."

Statement of the Case

1. Introductory

The appeals in the Court below (357a-359a) were from final judgments (351a-353a) of the United States District Court for the Eastern District of New York (Bartels, *D.J.*), entered November 30, 1962 (December 7, 1962), after a jury trial, convicting petitioners Mugnola and Yuastella under one substantive count (Count 3—18 U.S.C. 472 and 2) and one conspiracy count (Count 5—18 U.S.C. 371), charging violation of the statute against possession of counterfeit money (18 U.S.C. 472) (14a, 15a).* Petitioners Mug-

* These conviction counts of the indictment were deemed amended during the trial, so as to eliminate certain named defendants and so as to limit the charges to "possession"; see details *infra*.

nola and Yuastella were each sentenced to eight years on the substantive count and five years on the conspiracy count, to run concurrently (352a, 353a).

Counts 3 and 5—the conviction counts herein—had originally named, in addition to Mugnola and Yuastella, the following persons: John Mentesana, Ralph De Santis, Michael Kane, Ronald Russo and Charles Gersh. In addition, count 5 (the conspiracy count) had also named John Tarpey as a defendant, and Jose Monteiro and Mac Gladding as co-conspirators (14a, 15a). On motion of the Government, Mentesana and Tarpey were severed (5a), and De Santis was severed as to count 3 (5a). De Santis pleaded guilty to count 5 (4a). Also on motion of the Government, two other substantive counts, counts 1 and 2 (in which the within petitioners were not named) were severed, respectively, as to Mentesana and De Santis and as to those two defendants and Tarpey (5a).* Because of the severance of counts as aforesaid, the Government announced at the trial that it did not intend to offer proof of overt acts 1 and 2 under the conspiracy count (15a-16a, 18a). Also, during the trial the Court granted defense motions to strike from the conspiracy count the allegations of passing, uttering etc. counterfeit money, thus limiting the case to one of "possession" (which had been the only charge anyhow under the substantive count (7a)).

The case went to trial, then, on the sole charge of possession (substantive and conspiracy) against the within petitioners Mugnola and Yuastella, and the co-defendants

* The Docket Entries apparently do not indicate the fact, but count 1 of substantive count, naming only defendant Kane, was also severed (18a).

Gersh, Kane and Russo. Near the end of the trial the court dismissed the indictment as to Russo (8a). The jury convicted the remaining four defendants on both counts (9a).

The severed defendant De Santis (who however had pleaded guilty to the conspiracy count, as above noted) was the Government's principal witness at the trial, together with one Wilbur Pokras, another accomplice who had apparently been serving as a Government informer and who was not named in the indictment as either a defendant or co-conspirator.

2. Summary of the Charges and the Trial Proofs

Preliminarily, we note that although the appellants in the Court below printed a comparatively substantial Joint Appendix for the appeal, said Appendix contains very little of the trial testimony but consists largely of certain pertinent colloquies on issues of law plus the charge to the jury. The appellants in the Court below printed so little of the testimony in their Appendix because the Trial Court's charge to the jury contained an exceptionally thorough review of the testimony.

From the testimony of the Government's witnesses, the jury could have reached the following conclusions:

Around the middle of November 1960, De Santis, who in the preceding weeks or months had been handling (on his own with Mentesana and perhaps Pokras) quite a few transactions for the sale of counterfeit money, spoke to Gersh and Russo about the possibility of their finding him another customer to buy some more of his counterfeit money.* A

* There was no proof, and the Government did not charge, that Gersh had previously been involved in any counterfeit transactions with De Santis or with anyone else.

few days later Gersh telephoned De Santis and said that he and Russo had located someone who could use the counterfeit money in quantities. That same night (November 22, 1969) Gersh brought to De Santis' boatyard the defendants Mugnola and Yuastella, along with defendant Kane. Negotiations followed for the sale by De Santis to Mugnola and Yuastella of $100,000. of counterfeit money for $16,000. The next day De Santis and Pokras obtained from the severed defendant Mentesana a bundle containing $100,000. of counterfeit money, for which De Santis agreed to pay $13,000. De Santis and Pokras, after riding around observantly in automobiles (evidently because De Santis was fearing surveillance), went to a motel, where they sorted out the counterfeit money and placed it in a dresser drawer in the motel room. After that, De Santis and Pokras went to meet Mugnola and Yuastella again, they all went back to the motel, Yuastella with Pokras went into the motel to look at the counterfeit money, and then, after some disputation about who of the group should go back into the motel to close the deal, Mugnola with Yuastella and Pokras with De Santis re-entered the motel, where Mugnola and Yuastella robbed De Santis and Pokras of the counterfeit money at the point of a gun. There followed various aftermath recriminations among De Santis, Kane and Gersh concerning this alleged robbery.

The foregoing, which is based on the testimony of De Santis and Pokras—was in essence the Government's case as to the basic alleged happenings which gave rise to this prosecution. See 259a to 280a.

None of the alleged counterfeit money was introduced in evidence in this case. Instead, De Santis and Pokras were allowed to testify, over defense objections, about the alleged

physical appearance of the alleged counterfeit money (261a, 264a, 268a, 276a); and a Government employee from the Bureau of Engraving and Printing (Mr. Garland V. Bell) was allowed, over defense objections, to answer hypothetical questions based on the De Santis and Pokras testimony (281a).

Petitioner Yuastella—also co-defendant Gersh—took the stand at the trial and denied the charges (282a-287a, 295a-296a).

3. The Facts Indicating Intimidation of the Jury

After the jury had rendered its verdict (October 22, 1962) the Trial Court for the first time, almost in passing, as it were, made the following announcement (337a-338a):

> "The Court: Well, I will tell you what bothers me here, Mr. Lewis, and I want all the defendants to hear that because I don't know just who is responsible, and that is this:
>
> Someone has made some phone calls, anonymous phone calls, to the witness Pokras; and someone has made some anonymous phone calls to the forelady of this jury—she reported them to me this morning—all yesterday without waiting for anyone to pick up the receiver and simply stopping as soon as the receiver was picked up, but then renewing the call every hour, beginning also this morning at 6:30.
>
> She had never received such calls before until she served on this jury, and of course there have been some phone calls to Pokras.
>
> Now, you know, Mr. Lewis, I would not stand for anything like that. If I ever found out who is responsible for that sort of thing, you know what I would do, don't you?
>
> Mr. Lewis: You would be entirely justified.

The Court: But, of course, we have no one to pinpoint and consequently I have to be fair and open-minded about it.

Mr. Lewis: I can't conceive—

The Court: But to whom it may concern, and I shall just issue a warning, that if I discover that anyone involved in this case is responsible directly or indirectly for such phone calls, I assure you that I would not hesitate to immediately see that he is remanded in custody.

Mr. Lewis: Judge, I cannot conceive of any defendant being stupid enough to do it because he would be certainly convicted.

The Court: Well, I kept it out of the case, gentlemen, but of course we cannot assume that these defendants did it either if we are going to follow our own principle that a man presumed innocent until proven guilty, but it is a coincidence which I ought to mention in passing."

Subsequently, at the sentencing (November 30, 1962) the defense moved for and was denied a new trial on the ground of the above happenings (339a-349a), and it was objected that there should have been a voir dire of the forelady of the jury "to find out whether or not she was prejudiced against defendants" (42a). The Trial Court took the view that this matter was of no importance; the Court also stated that it had been made known to him by a note from the forelady (345a), but apparently this note had been lost or mislaid; it was never produced for examination by defense counsel. (Further facts concerning this incident are noted *infra*.)

The Court below devoted extended treatment in its opinion to the issue as to the way in which the Trial Court handled the information about the telephone calls to the forelady of the Jury. (Appendix, *infra*, pp. A-5 to A-9).

In essence, the deciding reason of the Court of Appeals for rejecting our contentions with respect to these jury-telephone-call incidents was that the defense never requested a hearing to establish the facts concerning these happenings, that instead the defense (at the sentencing) moved for a new trial, and that the Court below was not disposed to direct a hearing to establish the facts pursuant to 28 U.S.C. §2106 because the appellants had not come forward with affidavits that would raise an issue of prejudice. Upon rehearing we unavailingly urged in the Court below that these rulings of that Court ought to be reconsidered in light of the following:

It was by no means clear from the record that defense counsel at the sentencing on November 30, 1962, freely and advisedly chose, as the opinion below suggests, to "shoot for" a new trial by reason of the prior failure to hold a hearing, rather than to try for such a hearing in itself. At 342a Mr. Lewis stated, "I believe that there should have been a voir dire conducted of the forelady before the case went to the Jury to find out whether or not she was prejudiced against the defendants", to which the Trial Judge instantly gave the following rejoinder bespeaking the absolute futility of any further defense effort to have a voir dire because the Trial Judge's mind was already made up:— "The Court: No, she was not prejudiced against any defendants." And on the very next line in the record we see the instantaneous (and, under the circumstances, inevitable) capitulation by defense counsel ("Mr. Lewis: That is all, Judge"). All of the ensuing colloquy (342a-349a) took place in this same Procrustean framework of the Trial Judge's already settled conviction on the question and his scarcely concealed displeasure at counsel's temerity in further pressing the issue at all. It is even doubtful, as one

reads these last cited pages of the record, that counsel would have dared, in the face of the Trial Judge's strongly manifested displeasure and impatience, to do so much as move for a new trial, had not the Trial Judge himself practically goaded (if not taunted) counsel into so moving (343a-344a). Yet, notwithstanding all of this pressure from the Trial Judge, defense counsel did once more try, before accepting the Trial Judge's challenge to make a motion for a new trial, to bring up the claim that "we should have had the right to a voir dire" (343a). Capping all this was the Trial Judge's even more peremptorily, and preclusively, worded announcement near the end of the colloquy on November 30 which could understandably have been taken by counsel as meaning both that the Trial Judge was simply not interested in any motions or requests of any sort on this subject but also that he was convinced that counsel were trying to impose upon him by building up a big thing out of a little nothing (348a):

> "The Court: Mr. McCann, let me make this quite clear: that I am going to deny any and all motions by all defendants for a new trial based upon this situation. This is making or expecting to make a (2107) molehill out of nothing in my opinion. It is not even a molehill."
>
> * * * * * *
>
> "* * * it makes no difference what your reasons are. You can make those in the Court of Appeals, Mr. McCann. * * *"

On the basis of the foregoing we requested the Court below on rehearing to reconsider its determination that it would not direct the holding of a hearing in exercise of the Court's powers under 28 U.S.C. §2106. In support of

this request we particularly asked the Court to give consideration to our above description of the colloquy at the sentencing on November 30, 1962 as affording substantial support for the conclusion that the within petitioners, upon a fair interpretation of the record, had failed on that occasion to request a voir dire primarily if not solely because the Trial Judge made it sternly plain that such a request would have been peremptorily refused even if it had been made when the matter first came to light after the verdict on October 22, 1962.

We also urged upon rehearing in the Court below that we were not able to determine from the Court's opinion whether the Court's reference to our failure to come forward with jurors' affidavits that would raise an issue of prejudice was something which the Court regarded as a still then continuing failure on our part which we were still to be given an opportunity to correct. And we represented that if the Court in disposing of the petition for rehearing, or perhaps in rendering an intermediate opinion thereon, should signify that the producing of such affidavits by us was deemed by the Court to be an open matter, we were prepared to move with all diligence to do so. We acknowledged to the Court below (upon rehearing) that possibly we were wrong in not seeking such affidavits without awaiting further word from that Court, but we explained that we were frankly unsure as to whether such would be a procedurally and professionally proper step, and that we hesitated to proceed without a further signification and clarification from the Court.

All of these suggestions and requests were evidently rejected by the Court below, which denied our petition for rehearing without opinion.

Reasons for Granting the Writ

1. We do not think it is intemperate to say that this case presents an all-but incredible short-shifting, at both trial and appellate levels, of the fundamental constitutional right of a defendant in a criminal prosecution to be tried by a fair and impartial jury (Amendment VI); and that this Court's intercession is needed in order to preserve the fair administration of Federal criminal justice, and to correct a ruling which has worked perilous attrition of a fundamental constitutional right.

The really rather extraordinary circumstances—the seemingly unmistakable fact that the forelady of the jury had been intimidated, the failure of the Trial Court to inform the defense about this until after the jury verdict, the failure of the Trial Court to have ordered *sua sponte* a timely voir dire and its refusal to grant any other relief (or even to entertain seriously any request for relief), after the verdict upon a motion for new trial, and the unavailability of the pertinent documentary item (the note from the forelady to the Trial Judge)—oblige us to urge before this Court with all respectful vigor that the judgments affirming the convictions herein should be reviewed as being, in a degree of strongly indicated possibility, the result of a verdict which was not rendered by a fair and impartial jury.

The general rule was stated in *Mattox* v. *United States*, 146 U.S. 140:

> "Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

The *Mattox* case *supra* was cited in *Klose* v. *United States*, 49 F. 2d 177, 181 (C.C.A. 8, 1931), where the Court particularly spoke of "intimidation" of jurors:

> "* * * It is the duty of the trial judge to maintain the integrity of trials by jury, and if it appears at any stage of the trial before verdict that misconduct of any juror or other person has tainted the panel with any sort of corruption, or intimidation, or coercion, the trial should be stopped and a mistrial granted. United States v. Russell, 255 U.S. 138, 41 S. Ct. 260, 65 L. Ed. 553; Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917; Sunderland v. United States (C.C.A.) 19 F. (2d) 202. * * * *"

The rule of the *Klose* case *supra* (which, in turn, had followed the *Mattox* decision of this Court), was again stated in *Carness* v. *United States*, 187 F. 2d 719, 723 (C.A. 9, 1951), i.e., that there are instances of improper communication between a juror and an outsider where "* * * as a matter of policy prejudice must be conclusively presumed, as where the irregularity 'has tainted the panel with any sort of corruption, or intimidation, or coercion' * * * *".

As remarked by Mr. Justice Brennan when he was on the Bench of the Supreme Court of New Jersey, "* * * the law [is] zealous to protect every accused from a verdict prejudiced by the taint of extraneous influence, * * * *". *State* v. *Kociolek*, 20 N.J. 92, 118 A. 2d 812 (1955).

Numerous other state cases in which conversations or communications between jurors and outsiders have been held ground for new trial or reversal are collected in 22 A.L.R. 260-261, 274-276, 34 A.L.R. 107, 62 A.L.R. 1467-1468.

The situation with which the Trial Court was confronted in the instant case when he learned from the forelady of the jury, *shortly before the jury commenced deliberating*,* was one which *ipso facto* called for an immediate notification of this happening to counsel. Moreover, the forelady had informed the Court of this happening by a written note, and the Court subsequently communicated with the forelady in writing or verbally or both (344a-345a), all out of the presence and without the knowledge of counsel or the defendants. Had the Court informed counsel of these happenings, the defense would have had an opportunity to request a *voir dire*, before the Jury deliberated and decided upon its verdict, to find out whether prejudice to the defendants had occurred. In the present state of the record—even the written note or notes themselves are missing—it is impossible to determine what prejudice these happenings may have caused to the defense. The defense cannot say, nor can the Government, to whom the telephone calls are attributable. The defense cannot say, neither can the Government, whether or to what extent the calls were prejudicial. Above all, there is nothing in the record from which anyone can say whether the fore lady discussed this disturbing incident with any of her fellow jurors. This last is not alleviated by the Trial Court's statement that the forelady "was definitely instructed not to mention this to any other juror" (345a), because this does not cover the crucial question of whether the forelady may already theretofore have discussed the matter with other jurors;* nor

* The jury retired for their luncheon recess and to commence their deliberations at 1:55 P.M. on October 22, 1962 (243a, 319a). Right after the motions to set aside the verdict, the Court announced that the forelady had reported the telephone calls to him "this morning" (337a).

does it cover the question of whether she heeded the Court's instruction; nor, of course, does it cover the question of whether the forelady herself was prejudiced on account of the phone calls.* In the absence of a record of the thoroughgoing kind of *voir dire* to which the defense was entitled under this issue and which it undoubtedly would have demanded, no one can say what ultimate prejudice resulted.

What we have here, then, is a most unusual kind of impasse of fair trial, owing to the Trial Court's having taken it upon himself to treat this quite potentially grave matter as something which was merely private between the Judge and the juror. See the familiar cases, found throughout the American jurisdictions, holding that there should be no communication between court and jury, except in open court, especially when the case has been submitted to the jury or is nearly ready for submission to them. *Dodge* v. *United States*, 258 Fed. 300 (C.C.A. 2 1919), certiorari denied 250 U.S. 660; *Little* v. *United States*, 73 F. 2d 861 (C.C.A. 10 1935); *Ray* v. *United States*, 114 F. 2d 508 (C.C.A. 8 1940), certiorari denied 311 U.S. 709; *Deming* v. *State*, 133 N.E. 2d 51 (S. Ct. Indiana); *State* v. *McGlade*, 196 P. 2d 173, 165 Kan. 425.

The cases would naturally be rare in which a Trial Court would, as here not proceed at its own instance to bring to the attention of the parties an incident of the sort here involved which might well point to intimidating or other improper influence upon a juror; the Trial Court in our case did bring it to the parties' attention, but he did not do so in a timely manner. Cf. *People* v. *Durling*, 303 N.Y. 382,

* The phone calls had been going on since the preceding day.

103 N.E. 2d 336, where it was held that the Trial Court's flat refusal to hear evidence of misconduct of jurors offered by the defendant's attorney, or at least to give a short adjournment or an opportunity to supply affidavits, was an abuse of discretion.

Cf. also *People* v. *Pauley*, 281 App. Div. 223, 119 N.Y.S. 2d 152 (4th Dept. 1953), where a lady juror had falsely answered certain questions upon the *voir dire* examination at the time of selection of the jury, which questions were not shown to have had any particular bearing on her ability to render an impartial verdict, but where she had also failed to report certain threatening phone calls made to her during the trial. In reversing the judgment of conviction on this last mentioned ground *inter alia*, the Court said (119 N.Y.S. 2d at p. 155):

> "* * * although admonished by the court repeatedly to report any attempts made to talk with jurors about the case, she said she had telephone calls of a threatening nature from persons unknown during the trial and after. She was frightened, but she did not report these calls to the court or to the district attorney. What effect these threats had upon her vote, we do not know, but a verdict under such circumstances cannot be upheld. It was not necessary for the defendants to show that the juror's conduct upon her examination and during the trial influenced the verdict. If it was likely to do so, it was sufficient to warrant the granting of the motion. Payne v. Burke, 236 App. Div. 527, 260 N.Y.S. 259. * * *"

2. Certiorari is appropriate also—in the interest of the fair administration of Federal criminal justice—to correct the following combination of injustices which were seem-

ingly built into this case by the very design of the prosecution from its first conception and on through the trial:

Let us try to put ourselves so to say, in the "shoes" of the prosecution attorneys in this case. It is not difficult to reconstruct the tactical plan of this prosecution and the problems which the prosecution attorneys faced and tried to overcome in this case: At the outset, in its effort to build this case, the Government had information from its anteriorly recruited informant Pokras and from De Santis, to the effect that De Santis on suggestion of Gersh had been expecting to sell counterfeit money to Mugnola and Yuastella, and that the latter two individuals instead took the counterfeit money by robbery. But not only was this the Government's *outset* information, it was *all* the information that the Government ever did develop for the purposes of this prosecution—aside from incidental items which, we think, do not significantly affect the question of the adequacy of the Government's *probatum*.

What emerges from this picture of the Government's outset (and *ultimate*) investigative information is that (1) no counterfeit money constituting proof of the *corpus delicti* existed; (2) and no *common scheme*, viewed either substantively or conspiratorially, existed as among the De Santis-Gersh-Russo-Pokras-Mentesana "group" on one hand, and the Mugnola-Yuastella "group" on the other hand. No such common scheme existed, if for no other reason than that De Santis and Mentesana (and perhaps also Pokras) were already, antecedently to the arrival on the scene of Mugnola and Yuastella (and, incidentally, of Gersh), up to their armpits in a distinct and independent and fully subsisting "possession" operation in the counter-

feit money business. Our point in this last respect is that Mugnola and Yuastella (and likewise Gersh) were not needed to put De Santis (or Mentesana, or apparently, Pokras) into "possession" or into a process looking towards "possession" of counterfeit money. De Santis was already, antecedently, in complicity with Mentesana (and, it would appear, Pokras), quite well installed indeed in that "business". De Santis and Mentesana (and [?] Pokras) were already antecedently sellers of counterfeit money, who were looking for individual customers. What were Mugnola and Yuastella in this scene—and, what was Gersh in this scene? The former, Mugnola and Yuastella, were prospective "one shot" individual or "single-isolated-transaction" prospective customers"—and Gersh was the likewise single-isolated middle man for such single-transaction. But, further, what was this prospective single-transaction? Was it not, purely and simply and at most, in legal contemplation, a prospective purchase from an established enterprise, as distinct from a conspiratorial plan to have De Santis et al. obtain "possession" of counterfeit money for the purpose of making such counterfeit money available to Mugnola and Yuastella? If we are correct in this last, then it follows that Mugnola and Yuastella could not have been chargeable with "aiding and abetting" the "possession" of the De Santis group under the substantive count, because the latter group already had such "possession"; and it likewise follows that Mugnola and Yuastella could not have been chargeable with "conspiring" with the alleged De Santis group for such "possession" not only because the latter group already had such "possession" (in all practical and legal effect), but also because the alleged Mug-

* See cases cited *infra*.

nola-Yuastella group was engaged (according to the Government's theory) in just about as separate a "conspiracy" as could be imagined, namely, a conspiracy to rob the existing "possessors". Not only does the case therefore present a grave issue of prejudicially misjoined multiple conspiracies under the conspiracy count itself, but it presents a likewise grave issue of misjoinder of offenses under the substantive count (No. 3) on which the defendants were tried.

The theory of the substantive count of the indictment (Count 3) is that the several named defendants under that Count—i.e., the De Santis group and the alleged Mugnola-Yuastella team—committed acts of a criminal nature which are sufficiently related to make them joinable under said Count 3. This theory of the indictment, however, is negated by the Government's own theory of the case as developed in the trial proofs. It is hardly necessary to cite the familiar authorities for the proposition that improper joinder of persons or of counts under an indictment is unjustified and results in prejudicial wrong entitling the aggrieved defendant to either a severance or to a dismissal of the indictment. F.R. Cr. P. 8, 14; *Ingram* v. *United States*, 272 F. 2nd 567 (C.A. 4 1959); *Stokes* v. *United States*, 93 F. 2nd 744 (C.C.A. 5 1938), cert. den. 304 U.S. 558; *Wilson* v. *United States*, 190 Fed. 427 (C.C.A. 2, 1911); *Kidwell* v. *United States*, 38 App. D.C. 566 (1912).

As above pointed out, De Santis and his cohorts in the alleged counterfeiting ring which sought out Mugnola and Yuastella as prospective customers needed no such prospects or customers to induce them to obtain "possession" of counterfeit money. De Santis and Mentesana, and who-

ever else may have been involved with them in producing and marketing the counterfeit money, were engaged, then, in a fully established enterprise that had "possession" of counterfeit money before Mugnola and Yuastella were ever heard of—and indeed before Gersh was spoken to by De Santis in November 1960 in the conversation which allegedly led to the appearance of Mugnola and Yuastella as "prospects".

But if the "possession" offense by the De Santis group was complete before Mugnola and Yuastella appeared on the scene, how does the Mugnola-Yuastella role as alleged robbers of the De Santis group conceivably come within the concept of joinder of similar or related transactions? The Government insists that Mugnola and Yuastella robbed De Santis and Pokras of the counterfeit money, and it is broached, according to the Government's proofs, that this is what Mugnola and Yuastella were intending all along. Since when are a robber and his victim deemed in the eyes of the law to be engaged in a 'single related series of transactions'?

If Mugnola and Yuastella are guilty of an indictable Federal offense upon the Government's showing in this trial it is the offense of possession of counterfeit money—but not in joinder with De Santis, Pokras, Mentesana et al. Indeed, strictly speaking, the offense with which Mugnola and Yuastella may be said to be chargeable is one which does not exist in the Federal statutes, namely, larceny of counterfeit money. Indeed, further, if such an outré crime exists at all—how would even the most ingenious prosecutor go about proving the "value" of counterfeit paper money? —it would exist only under state law.

That it was prejudicial to join the alleged Mugnola-Yuastella "possession" (*via* the alleged robbery) with the De Santis et al. "possession" needs little demonstration. The jury in this trial were regaled with every manner of portentous "proof" of the grave criminal nature of the activities of the De Santis counterfeiting ring. Even if the alleged Mugnola-Yuastella robbery could in some legally conceivable way be "integrated" joinder-wise with these activities of the De Santis counterfeiting ring, it would have been prejudicially unfair to subject Mugnola and Yuastella to joint prosecution with the De Santis ring when all that Mugnola and Yuastella are charged with is a single robbery of counterfeit money from what was apparently a major counterfeiting mill.

However, it is when we consider the conspiracy-count joinder—in conjunction with the substantive-count joinder—that the full impact of the injustice of the joinder aspects of this prosecution becomes clearest. We now turn to this aspect of the case.

To begin with, it seems beyond serious question that the conspiracy count of the indictment (Count 5) necessarily represents a joinder of two separate conspiracies, namely, the "possession" conspiracy of the De Santis counterfeiting group, and the alleged robbery conspiracy of Mugnola and Yuastella. See *Kotteakos* v. *United States*, 328 U.S. 750.

Secondly, the existence in the case of the conspiracy count of the indictment made it possible for the Government to introduce a prodigious mass of hearsay evidence which would not have been admissible under the substantive count. See *United States* v. *Bentvena*, 319 F. 2nd 916 (C.A. 2,

1963). This Court may obtain an idea of the pervasive and indiscriminate intermingling of the proofs under the substantive and conspiracy counts by examining the Trial Court's summary of the evidence in its charge to the jury at 259a-280a.

Third, since the De Santis et al. group of counterfeit-money sellers were an established enterprise, the Mugnola-Yuastella purchase offer was merely a "single isolated transaction", not amounting to a joining of a "conspiracy". *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (C.A. 2, 1957). The recent case of *United States* v. *Ford*, 324 F. 2d 950 (C.A. 7, decided November 21, 1963), seems to us to lend very strong additional support indeed to our contention that the Government's entire theory of "conspiracy" to "possess" counterfeit money was utterly illusory in this case as regards the petitioners Mugnola and Yuastella; and, incidentally, the *Ford* case seems to raise a conflict among Circuits in light of the decision in our case. The *Ford* case was a prosecution for conspiracy to receive and sell jewelry stolen in interstate commerce. A man named Patterson had burglarized a place and had there stolen the jewelry in question. That night he met a woman named Heitman, who took him to the residence of one Allison, an alleged conspirator. Allison took possession of the jewelry. The next night Allison tried to sell the jewelry to several persons. Ford received from Allison about eighteen rings and watches to take them to be appraised. Lafer he returned these items to Allison and bought from the latter a wristwatch for which he paid $80. The Seventh Circuit Court of Appeals stated that it agreed with the Government that it was most improbable that those present did not know the jewelry was

stolen, but that it was not convinced that inspecting stolen jewelry or asking its price establishes "conspiracy". The Court further said:

> "We hold that Ford's actual purchase of one of the watches did not involve him in a conspiracy. The relationship of buyer and seller, absent any prior or contemporaneous undertaking beyond the mere sales agreement, does not prove a conspiracy to sell, receive, barter or dispose of stolen property, although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."

The Court cited, in support of this conclusion, two cases from the Second Circuit—*United States* v. *Koch*, 113 F. 2d 982, 983; and Judge Learned Hand's decision in *United States* v. *Zeuli*, 137 F. 2d 845—which have now apparently gone by the board (under the decision here sought to be reviewed).

It must be remembered that the charge of passing and uttering counterfeit money was eliminated from the indictment by the Court below in our case. All that remained in the conspiracy count was the charge of "possession", which had been the sole charge from the outset under the substantive count as well. How can a buyer be in a conspiracy with the seller to "possess"? The decision in *United States* v. *Ford*, *supra*, says emphatically, and persuasively, we submit, that this cannot be. *A fortiori*, as we earlier said, how can a thief be in a conspiracy with his victim to "possess"?

The conclusion seems inescapable that the conviction in this case under the conspiracy count cannot stand. If we are

correct in this then, again, the rule above mentioned which was laid down in *Bentvena* v. *United States*, 319 F. 2d 916 (C.A. 2, 1963), comes into play, and the convictions under the substantive count likewise cannot stand. For *Bentvena* held that where the evidence was insufficient to establish certain defendants' participation in the conspiracy, and where those defendants had been prejudiced under the substantive counts through the indiscriminate and unsegregated admission in evidence of a mass of testimony which was admissible only under the conspiracy count, the substantive convictions had to be reversed. The Court especially emphasized that this conspiracy evidence pertained in large part to other defendants and it said (p. 955):

> "* * * We cannot feel confident that the admission of this evidence against them, when it was legally inadmissible unless they were shown to be part of the conspirac[illegible], did not contribute to their convictions on the substantive counts by blackening them with the general guilt. * * * "

In our case, just as in *Bentvena*, there was a mass of prejudicial conspiracy evidence which would not be admissible under the substantive count as such. If the conspiracy convictions herein be reversed, consideration, under the *Bentvena* rule, should be given to the following facts:—All testimony by De Santis concerning his conversations with Gersh, Russo and Kane prior to the appearance on the scene of Yuastella or Mugnola would be inadmissible under the substantive count. The same is true of De Santis' conversations with Pokras prior to the appearance of Yuastella or Mugnola. The same is also true of Pokras' conversations with the law enforcement officers prior to such appearance on the scene by Yuastella or Mugnola. Still another cate-

gory of similarly prejudicial evidence which must have contributed to the conviction under the substantive count (indeed under the conspiracy count as well—and illegally so under both counts) was the following: Repeatedly, throughout the trial the Government, over the most strenuous defense objections, kept bringing to the Jury's attention testimony of conversations among the defendants other than Mugnola and Yuastella which took place after the alleged robbery and whose object was to depict Mugnola and Yuastella as having been the ones who did stage that robbery and as being otherwise characters of unfavorable ilk. It is true that the Trial Court admonished the Government concerning this just about as repeatedly as the Government kept resorting to it (See, e.g., 39a, 40a, 77a, 91a-103a; our printed Appendix in the Court below, lengthy as it is, does not contain by any means all of the instances of the Government's well-nigh incredible flouting of the Court's admonitions and of the fundamental principle of the law of evidence involved. Somewhere, in fairness and in justice, there must be a limit of tolerance for this sort of deluging of the minds of a criminal trial jury with illegal evidence whose prejudicial effect is supposedly palliated by the Trial Court's admonitions. All of this post-conspiracy evidence could not but have had a gravely harmful effect upon the case of Mugnola and Yuastella.

The Court of Appeals' disposition of our contention as to the Government's failure to allege and prove a "conspiracy" for possession of counterfeit money seems to us to reflect a quite insufficient consideration by the Court of the following important theme in our argument on this conspiracy issue:—We did not argue merely, as the Court's opinion seems to assume, that the conspiracy charges and

proofs failed on account of the stealing intention of Mugnola and Yuastella *vis a vis* the selling intention of De Santis; more fundamentally, what we argued was that the charges and proofs looked not to a "conspiracy" for possession at all but instead to a single isolated transaction of purchase and sale of counterfeit money, which would be altogether inconsistent in law with "conspiracy" guilt. The Court's opinion does not mention at all this feature of the case or our contentions in regard thereto. The Court's opinion does not mention our argument that prior to any arrival on the scene by the within petitioners Mugnola and Yuastella, De Santis and Mentesena (and perhaps also Pokras) were already established in a fully subsisting "possession" operation in the counterfeit money business, so that Mugnola and Yuastella were not needed to put De Santis (or Montesena, or, apparatly Pokras) into "possession" or into a process looking towards "possession" of counterfeit money. The Court's opinion did not mention the *Ford* case, *supra*, which we believe to be worthy of the utmost serious consideration as supporting our argument that although Mugnola and Yuastella may have been single-transaction prospective purchasers of counterfeit money they were not "conspirators" with the other alleged conspirators to obtain "possession" of counterfeit money.

3. As noted, none of the alleged counterfeit money was introduced in evidence in this case. Instead, De Santis and Pokras were allowed to testify about the alleged physical appearance of the alleged counterfeit money, and a Government employee was allowed to answer hypothetical questions based on the De Santis and Pokras testimony.

We submit that this was insufficient proof of the corpus delicti. There may be other cases where charges of dealing

in counterfeit money have been deemed sufficiently proved without producing at least some of the physical evidence of the corpus delicti, but we have not found any such cases. On principle, it seems to us that justice requires a literally absolute rule of law barring conviction in such a case without production of some physical evidence consisting of counterfeit money, and that at the very least there should be such a rule for cases like the instant one where the only testimony of the existence of the alleged counterfeit money comes from accomplice witnesses. Without such a rule, the danger is too great that unscrupulous accomplices will fabricate cases in hopes of purchasing governmental favor for themselves. The tradition of Anglo-American law which requires proof of the corpus delicti in prosecutions for crime is swept aside when convictions are allowed upon a record like the present one.

Moreover, the question is not merely that of proof of the corpus delicti. The statute (18 U.S.C. 472) requires proof of "intent to defraud", which means that a jury must be able to determine whether the particular alleged counterfeit money in the case before it was of such a physical character as to support such intent. In other words, if the counterfeit money in a particular case were so manifestly fake that no normal person could be defrauded into accepting it, how could a normal defendant be chargeable with a fraudulent intent in possessing (with a view to passing) such "money"? In no aspect was this important question really considered from an adjudicative standpoint in this case either by the court or the jury, nor could it have been adjudicated in view of the utter absence of physical proof of the corpus delicti.

It is hardly necessary to cite cases on the strict standard of proof of intent to defraud and scienter of the counterfeit nature of the alleged counterfeit money in prosecutions under this statute. Eg., *United States* v. *Kelley*, 186 F. 2nd 598 (C.A. 7 1957), cert. den. 341 U.S. 954; *United States* v. *Ruffino*, 67 F. 2nd 440 (C.C.A. 2 1933); *United States* v. *Litberg*, 175 F. 2nd 20 (C.A. 7 1949); *United States* v. *Berkley*, 288 F. 2nd 713 (C.A. 6 1961), cert. den. 368 U.S. 822; *Hill* v. *United States*, 275 Fed. 187 (C.C.A. 7 1921); *United States* v. *Camparo*, 63 F. Sup. 811 (E.D. Pa. 1945).

4. Further and cumulatively contributing to the unfairness of this trial—and calling therefore the more for this Court's intercession—is the fact that the Trial Judge took away from the jury the factual issue of whether De Santis was actually an accomplice and in effect instructed them that De Santis was an accomplice as a matter of law (303a), over defendants' exception (315a). This was error. Cf. *Holmgren* v. *United States*, 242 U.S. 470, 495; *Phelps* v. *United States*, 252 F. 2d 49, 53 (C.A. 5, 1958); *United States* v. *Vanco*, 131 F. 2d 123, 126 (C.C.A. 7, 1932); *United States* v. *Baladimas*, 177 F. 2d 485, 488 (C.A. 7, 1949).

It is important to remember that petitioner Yuastella took the stand at the trial and denied the charges, and that petitioner Mugnola likewise denied the charges through his plea of not guilty. This means that both of these petitioners were absolutely denying that De Santis was an accomplice of *theirs*. For the Court therefore in effect to instruct the jury that De Santis was an accomplice as a matter of law was not only to take away from the Jury this crucial issue of fact in itself, but it was also in effect telling the Jury that Yuastella and Mugnola were lying in their denial of the charges. In short, this charge by the Trial

Court was equivalent to a direction of a verdict of guilty. The charge completely negated Yuastella's and Mugnola's denial that they were accomplices of De Santis. The Court of Appeals' effort to play down the explicitness of the Court's instruction (Appendix, *infra*, pp. A-4 to A-5) has an unconvincing ring when we take into consideration a statement by the Trial Court, during the exceptions to the charge, in which the Court gave his own interpretation of the instruction to the Jury, as follows (315a):

> "Mr. Lewis: I object to your Honor's characterization of De Santis as an accomplice.
>
> The Court: Well, what is he?
>
> Mr. Lewis: That is for the jury to determine and not your Honor.
>
> The Court: Didn't he plead and didn't he testify that he was?"

The highly prejudicial effect of the Trial Court's charge in our case recalls the words of *United States v. Toner*, 173 F. 2d 140, 142 (C.A. 3, 1949):

> "* * * If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A * * *."

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners
Mugnola and Yuastella

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—September Term, 1963.

(Argued January 22, 1964 Decided February 17, 1964.)

Docket No. 28332

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES GERSH, ANTHONY MUGNOLA and PETER YUASTELLA,

Defendants-Appellants.

Before:

FRIENDLY and HAYS, *Circuit Judges*, and ANDERSON, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York convicting appellants, after a jury trial, of keeping counterfeit money in their possession with intent to defraud in violation of 18 U. S. C. §472 and of conspiring to commit that crime in violation of 18 U. S. C. §371. Affirmed.

JEROME LEWIS, Brooklyn, New York, *for Appellants Mugnola and Yuastella.*

* Sitting by designation.

JOSEPH BRILL, New York, New York, *for Appellant Gersh.*

MARTIN R. POLLNER, Assistant U. S. Attorney (Joseph H. Hoey, United States Attorney, Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge:*

After a jury trial before Judge Bartels in the Eastern District of New York, appellants Gersh, Mugnola and Yuastella were convicted on a count charging that they knowingly and with intent to defraud kept counterfeit money in their possession in violation of 18 U. S. C. §472 and on another count charging that they conspired to commit that crime in violation of 18 U. S. C. §371.

The evidence showed that Gersh, the first of the three to become involved, along with his partner Russo, was approached by Ralph De Santis to procure purchasers for counterfeit bills. Gersh shortly told De Santis he had found a prospective buyer. A meeting was arranged at the boatyard of one Pokras, who, having previously been offered counterfeit for sale by De Santis, secretly advised the authorities of what was afoot. Gersh came to the boatyard with Mugnola and Yuastella and Michael Kane who was also convicted and is now a fugitive. Gersh reported that Mugnola and Yuastella, friends of his friend Kane, wanted to buy counterfeit and that Kane's cut would come out of Gersh's share. Kane announced in the presence of Mugnola, Yuastella, Gersh and De Santis that his friends were "ready to buy the money now," and Yuastella showed

De Santis a shoebox purportedly containing $20,000 with which he wanted to do business that night. Not yet having procured the merchandise, De Santis could not comply, but he agreed to pick up Mugnola and Yuastella at the boatyard the next evening and to sell them $100,000 in counterfeit for $16,000 cash. The next morning De Santis instructed Pokras to reserve a room at a motel wherein to consummate the bargain. Pokras reserved two rooms, leaving one key for the Secret Service who hid personnel there. At a bar De Santis then purchased $100,000 in counterfeit for $13,000 on credit and drove off with Pokras to the motel. On seeing what he took to be a police car, he insisted on going to a different motel where he and Pokras counted and examined the counterfeit. There were fifty piles, each containing approximately one hundred twenty-dollar bills. Pokras and De Santis testified that the bills bore the same serial number, that they had a peculiar odor and that they left ink stains on the hands when crumpled. At the appointed hour, the two returned to the boatyard, picked up Mugnola and Yuastella and drove them to the motel. After some preliminary bickering over safeguards and procedure, all four went to the room, where the counterfeit was reposing in a drawer. Matters then took what for De Santis and Pokras was an unexpected turn. Producing revolvers, Mugnola and Yuastella forced them into the bathroom and commanded them to wait there for twenty minutes. When they emerged, Mugnola and Yuastella were gone and so, of course, was the counterfeit. De Santis later complained to Gersh that he would hold him responsible for the contretemps, but such efforts as Gersh and Kane

made to find the absconders proved unavailing. The record contains much more, but the foregoing summary is sufficient.

Most of appellants' points require little or no discussion. The claim that Mugnola and Yuastella could not have conspired with De Santis *et al.* since the former intended to steal and the latter to sell verges on the ludicrous. The statute forbids possession of counterfeit with intent to defraud; the evidence amply warranted the jury in finding that appellants agreed to bring the counterfeit first into De Santis' possession and later into Mugnola's and Yuastella's. There was no less a meeting of the minds on this because, whether initially or later, Mugnola and Yuastella determined to deceive the deceiver. The Government's failure to produce the counterfeit, which admittedly is no bar to the conviction on the conspiracy charge, *United States* v. *Agueci*, 310 F. 2d 817, 828 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), is likewise no bar as to the substantive count in the light of the Government's inability to find the counterfeit and the substantial evidence offered in regard to it, *United States* v. *Agueci*, *supra*, at 828; *Lisansky* v. *United States*, 31 F. 2d 846, 850 (4 Cir.), cert. denied, 279 U. S. 873 (1929); *McDonald* v. *United States*, 89 F. 2d 128, 136-37 (8 Cir.), cert. denied, 301 U. S. 697 (1937). Complaint is made that, in giving the usual cautionary charge, the judge referred to De Santis as an accomplice; this, it is said, prejudiced appellants by indicating a belief by the judge that De Santis had joined them in wrongdoing. The Government responds that Judge Bartels began this portion of the charge by characterizing De Santis as "a confessed accomplice" which he surely was, and that

the jury must have understood the instruction to relate to the testimony of a person who had cast himself in that role. We are clear that the instruction sufficiently met the demands of nicety and could not have been considered by the jury as indicating any prejudgment by the court.

One matter requires more extended discussion. The jury, having deliberated since lunchtime, rendered its verdict at 10:45 P.M. on October 22, 1962, and was excused fifteen minutes later. After various motions had been made and decision on them reserved, the Government asked that the defendants be remanded in custody, which defense counsel naturally opposed. The following colloquy ensued.

> "The Court: Well, I will tell you what bothers me here, Mr. Lewis, and I want all the defendants to hear that because I don't know just who is responsible, and that is this:
>
> Someone has made some phone calls, anonymous phone calls, to the witness Pokras; and someone has made some anonymous phone calls to the forelady of this jury—she reported them to me this morning—all yesterday without waiting for anyone to pick up the receiver and simply stopping as soon as the receiver was picked up, but then renewing the call every hour, beginning also this morning at 6:30.
>
> She had never received such calls before until she served on this jury, and of course there have been some phone calls to Pokras.
>
> Now, you know, Mr. Lewis, I would not stand for anything like that. If I ever found out who is responsible for that sort of thing, you know what I would do, don't you?
>
> Mr. Lewis: You would be entirely justified.

The Court: But, of course, we have no one to pinpoint and consequently I have to be fair and open-minded about it.

Mr. Lewis: I can't conceive—

The Court: But to whom it may concern, and I shall just issue a warning, that if I discover that anyone involved in this case is responsible directly or indirectly for such phone calls, I assure you that I would not hesitate to immediately see that he is remanded in custody.

Mr. Lewis: Judge, I cannot conceive of any defendant being stupid enough to do it because he would be certainly convicted.

The Court: Well, I kept it out of the case, gentlemen, but of course we cannot assume that these defendants did it either if we are going to follow our own principle that a man [is] presumed innocent until proven guilty, but it is a coincidence which I ought to mention in passing."

On November 30, when the defendants appeared before the court for sentence, counsel moved for a new trial on the ground "that there should have been a voir dire conducted of the forelady before the case went to the jury to find out whether or not she was prejudiced against the defendants." The judge then gave this further elucidation:

"Here is the way it happened: She sent in a note to the effect that her husband was ill and she wanted someone to call up her husband to see how he was; and whether or not the phone calls that had been the preceding day or that night—I forget which—were continuing; and I had the bailiff or my law clerk—I don't know which—make the call to her husband. The report was that not phone calls had been con-

> tinued or continued and a note was sent in that her husband was all right. The phone calls had not continued."

He added that the forelady had not suggested that she connected this disturbance with the defendants and that, in the message he had sent back, she "was definitely instructed not to mention this to any other juror." Counsel then renewed the motion for a new trial; the judge denied it.

The record does not leave it altogether clear whether the communication from the forelady was received before the jury began its deliberations, as would appear from the judge's statement on the evening of October 22 that she had reported the telephone call "this morning," or during the deliberations, as seems to have been assumed at the argument on November 30. If the former was the case, the judge should have advised counsel immediately on receiving the report; on a suitable request he should then have examined the forelady and possibly other jurors as well. On the other hand, if the forelady's report came to his attention only during the jury's deliberations, we can see the wisdom of his not interrupting these, although it would have been better to have advised counsel then and there. In any event, hindsight now makes it plain that it would have been well for the judge to have held the jurors after the verdict so that they would be available if counsel, on learning of the incident, wished a hearing.

The Government contends that the matter is too trifling to warrant action on our part since there is no evidence that the forelady attributed the calls to any of the defendants, and furthermore that defendants waived the point

by failing to seek action on the night of the verdict. The latter argument would indeed be persuasive if defense counsel had known of the incident before the case was submitted to the jury or while it was deliberating, but had nevertheless stood mute, gambling on an acquittal while holding this issue in reserve. Cf. *United States* v. *Agueci*, 310 F. 2d 817, 836-38 (2 Cir. 1962). But that was not the fact. Counsel were told of the incident after the verdict and then only as it bore on the defendants' remand. This could well have diverted their attention from its possible significance as to the verdict, and we are not disposed to hold them to a very high standard of acuteness at midnight after a long day in court. Moreover, the jury had already been excused, and there is nothing to show that the forelady and, if necessary, other jurors could not have been examined on November 30 nearly as well as on October 23.

What we do find compelling in the Government's favor is that defense counsel did not ask for such an examination even then. The five and a half weeks' interval between October 22 and November 30 afforded ample opportunity to determine the appropriate remedy. Save when the conceded facts as to outside contact with a juror conclusively show prejudice, the court is not bound to order a new trial but rather to conduct a hearing in which the facts can be established, with the Government having the burden of showing that any such contact "was harmless to the defendant." *Remmer* v. *United States*, 347 U. S. 227 (1954), 350 U. S. 377 (1956); *Wheaton* v. *United States*, 133 F. 2d 522 (8 Cir. 1943). If a request for such a hearing had been made, it should have been granted. But

defense counsel never made such a request; their motion on November 30 was not for a hearing, which, so far as appears, would still have been entirely practicable and which the judge might well have directed had he been asked. Instead they sought a new trial because of his previous failure to hold a hearing, an error which counsel chose to regard as beyond correction. Although a hearing still has not been requested, we have considered whether, under our power to "require such further proceedings to be had as may be just under the circumstances," 28 U. S. C. §2106, we ought nevertheless to direct one, as was done in the *Remmer* and *Wheaton* cases, *supra*. We have concluded not to do so. Appellants have never come forward, as did the defendants in the *Wheaton* case, with affidavits of the forelady or of other jurors that would raise an issue of prejudice by showing that the forelady attributed the annoying calls to them. Something more than the mere fact of an unknown and here uncompleted contact with a juror is needed to call for vacating a judgment of conviction to permit a hearing which the appellants have not sought. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2 Cir.), cert. denied, 375 U. S. 836 (1963); *Mee* v. *United States*, 316 F. 2d 467, 468-69 (8 Cir. 1963).

Affirmed.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of February one thousand nine hundred and sixty-four.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
C.J.J.

HON. ROBERT P. ANDERSON,
D.J.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN MENTESANA, et al.,

Defendants,

CHARLES GERSH, ANTHONY MUGNOLA,
PETER ANTHONY YUASTELLA,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk